Supreme Court, U.S.
FILED
SEP 30 1983

Nos. 83-29 and 83-169

In the Supreme Court of the United States

OCTOBER TERM, 1983

CHARLES E. ROEMER, II, PETITIONER

v.

UNITED STATES OF AMERICA

CARLOS MARCELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

SARA B. CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioners were properly convicted under the conspiracy provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d) (No. 83-169).

2. Whether the use of the United States mails in this case provided an adequate basis for the charge of mail fraud as one of the predicate offenses in the RICO count (No. 83-29).

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 3

Conclusion 14

TABLE OF AUTHORITIES

Cases:

Cupp v. *Naughten*, 414 U.S. 141 6

Hankerson v. *North Carolina*, 432 U.S. 233 5

Henderson v. *Kibbe*, 431 U.S. 145 5

Jackson v. *Virginia*, 443 U.S. 307 8

Singer v. *United States*, 380 U.S. 24 5

United States v. *Archer*, 486 F.2d 670 ..... 12, 13

United States v. *Bagnariol*, 665 F.2d 877, cert. denied, 456 U.S. 962 ..... 4, 13

United States v. *Batchelder*, 442 U.S. 114 9

United States v. *Bledsoe*, 674 F.2d 647, cert. denied, No. 82-5071 (Nov. 29, 1982) 9

United States v. *Brooklier*, 685 F.2d 1208, cert. denied, No. 82-1013 (Feb. 22, 1983) 12

United States v. *Craig*, 573 F.2d 455 12

United States v. *Frady*, 456 U.S. 152 5

Page

Cases—Continued:

United States v. *Gambino*, 566 F.2d 414, cert. denied, 435 U.S. 952 13

United States v. *Griffin*, 660 F.2d 996, cert. denied, 454 U.S. 1156 ..... 4, 8, 9

United States v. *Herrera*, 584 F.2d 1137 13

United States v. *Lemm*, 680 F.2d 1193, cert. denied, No. 82-5371 (Jan. 10, 1983) 4

United States v. *Martino*, 648 F.2d 367, cert. denied, 456 U.S. 943 4

United States v. *Mazzei*, 700 F.2d 85, cert. denied, No. 82-6449 (May 23, 1983) 4, 5

United States v. *McLaurin*, 557 F.2d 1064, cert. denied, 434 U.S. 1020 9

United States v. *Pecora*, 693 F.2d 421, cert. denied, No. 82-1595 (June 13, 1983) 13

United States v. *Perrin*, 580 F.2d 730, aff'd, 444 U.S. 37 ..... 12, 13

United States v. *Turkette*, 452 U.S. 576 ..... 4, 5, 8, 9

Statutes:

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. (& Supp. V) 1961 *et seq.* :

18 U.S.C. 1961(4) 4

18 U.S.C. 1962(c) 4

18 U.S.C. 1962(d) 2, 3

Page

Miscellaneous:

U.S. Fifth Circuit District Judges Association, *Pattern Jury Instructions — Criminal Cases* (1978) 6

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-29

CHARLES E. ROEMER, II, PETITIONER

v.

UNITED STATES OF AMERICA

No. 83-169

CARLOS MARCELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (83-29 Pet. App. A1-A5) is reported at 703 F.2d 805. The opinions of the district court (83-29 Pet. App. A6-A55, A56-A105) are reported at 508 F. Supp. 586 and 537 F. Supp. 1364.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1983. Petitions for rehearing were denied on May 16, 1983, and May 31, 1983. The petition for a writ of certiorari in No. 83-29 was filed on July 11, 1983. The petition in No. 83-169 was filed on July 29, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners were convicted of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), in violation of 18 U.S.C. 1962(d).[1] The district court denied their post-verdict motions (83-29 Pet. App. A56-A105) and sentenced petitioner Marcello to seven years' imprisonment and petitioner Roemer to three years' imprisonment. The court of appeals affirmed (*id.* at A1-A5).

Petitioners' convictions followed an extensive Department of Justice investigation into illegal activities involving public officials, labor unions, and reputed organized crime figures in the Southwest.[2] As part of its investigation the FBI established and staffed a fictitious insurance company in California. Joseph Hauser, a convicted insurance swindler (Tr. 8-9, 4173-4174), cooperated with the undercover investigation and posed as a broker for the fictitious company (Tr. 20, 21, 28-30, 694, 4211).[3]

The evidence at trial, which is not in dispute, showed that in 1979 petitioner Marcello agreed to bribe state and local public officials in Louisiana in order to assist Hauser in obtaining public employee insurance contracts; in return, Marcello was to receive a percentage of Hauser's commissions. In a conversation consensually recorded by Hauser (Gov't Exh. 9), Marcello assured Hauser of his influence

---

[1] Petitioners were acquitted on 11 other counts charging a substantive RICO offense, mail and wire fraud, and interstate travel in aid of racketeering.

[2] This investigation has come to be called "Brilab," which derives from the term "bribery-labor."

[3] The citations to the record herein are taken from the government's brief in the court of appeals.

with both New Orleans and Jefferson Parish officials (Tr. 100, 691-693, 4260-4261; Gov't Exh. 9, at 2, 33-34, 45, 47-48, 52-53). Marcello then introduced Hauser to petitioner Roemer for the purpose of bribing Roemer in order to obtain the contracts.

At the time, Roemer was the Louisiana Commissioner of Administration, Executive Assistant to the Governor of Louisiana, and campaign manager for a Democratic gubernatorial candidate. Roemer was described by Marcello and co-defendant Irving Davidson[4] as "the top man," the "decision maker," and "the guy who was in charge" (Tr. 22, 823, 825, 6117; Gov't Exh. 40, at 1-2; Gov't Exh. 41, at 1; Gov't Exh. 42, at 5; Gov't Exh. 44, at 1). Roemer agreed to use his influence to deliver the state employees' group insurance contract in exchange for an advance payment of $25,000 and a 50% share of the future commissions, estimated at between $80,000 and $100,000 per month (Tr. 949-950, 953-955, 957-958; Gov't Exh. 58, at 2, 3, 5-6, 7-8, 9-10). Hauser later made two cash payments to Roemer involving a total of $25,000 (Tr. 1389, 1394, 4295, 4301, 4307, 6157; Gov't Exh. 77, at 8; Gov't Exh. 102, vol. 2, at 5).

ARGUMENT

1. Petitioner Marcello contends (83-169 Pet. 9-20) that the convictions in this case under the conspiracy provision of RICO were improper. He argues that the decision below "effectively eliminates the necessity of proving the existence of an enterprise as a separate element of the crime" (83-169 Pet. 9).

a. By its terms, the conspiracy provision of RICO (18 U.S.C. 1962(d)) makes it "unlawful for any person to conspire to violate any of the provisions of subsection * * * (c)

---

[4]Davidson, as well as two other co-defendants, were acquitted on all charges against them.

of this section" — that is, to conspire "to conduct or participate, directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity" (18 U.S.C. 1962(c)). Thus, a RICO conspiracy charge, like a RICO substantive charge (*United States* v. *Turkette*, 452 U.S. 576, 583 (1981)), requires an "enterprise" as a separate element of the offense.

This Court has recognized that, in cases in which the enterprise is a "group of individuals associated in fact" (18 U.S.C. 1961(4)), the proof of the enterprise may often "coalesce" with the proof of the predicate acts that constitute the pattern of racketeering activity. *United States* v. *Turkette*, *supra*, 452 U.S. at 583; see also *United States* v. *Mazzei*, 700 F.2d 85, 88-89 (2d Cir.), cert. denied, No. 82-6449 (May 23, 1983); *United States* v. *Lemm*, 680 F.2d 1193, 1199 (8th Cir. 1982), cert. denied, No. 82-5371 (Jan. 10, 1983). Likewise, in a RICO conspiracy case, the government may use the same evidence to prove both the enterprise element and the agreement to commit a substantive RICO violation. See *United States* v. *Lemm*, *supra*, 680 F.2d at 1199; *United States* v. *Bagnariol*, 665 F.2d 877, 890-891 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); *United States* v. *Griffin*, 660 F.2d 996, 1001 (4th Cir. 1981), cert. denied, 454 U.S. 1156 (1982); *United States* v. *Martino*, 648 F.2d 367, 382-383 (5th Cir. 1981), cert. denied, 456 U.S. 943 (1982). Indeed, where the enterprise consists of a group of individuals associated in fact for illegal purposes, the evidence of the defendants' association generally will overlap with the evidence of their conspiratorial agreement. See *United States* v. *Bagnariol*, *supra*, 665 F.2d at 891. But, as in *Turkette*, this similarity in proof does not gainsay that the agreement and enterprise elements of the RICO conspiracy

offense are "separate element[s] which must be proved by the Government" (452 U.S. at 583).[5]

In this case the district court instructed the jury on the agreement and enterprise elements of the RICO conspiracy charge (Supp. R. 23-30). Contrary to petitioner Marcello's contentions, these instructions adequately apprised the jury of the determinations necessary in order to return a verdict of guilty.[6]

b. Petitioner first asserts (83-169 Pet. 12) that the district court's introductory description of the conspiracy count, by stating the issue to be whether the defendants "unlawfully, willfully, and knowingly conspired to associate in fact as an enterprise * * * for the purpose of obtaining insurance contracts through a pattern of racketeering acitivity" (Supp. R. 25), was improper because it allowed the jury to find, "in effect, a conspiracy to conspire" (83-169 Pet. 12). Even

---

[5]This does not mean, contrary to petitioner's assertion (83-169 Pet. 16), that "every conspiratorial confederacy to commit predicate offenses would be punishable as a RICO violation." For example, an agreement to commit two isolated or sporadic criminal acts, while sufficient to establish a conventional conspiracy, would not be a RICO conspiracy offense. Compare *United States* v. *Turkette*, *supra*, 452 U.S. at 583 n.5. But such a situation is a far cry from the organized and ongoing association involved in this case (see page 8, *infra*).

[6]There is a serious question whether petitioner's challenge to the instructions is properly before this Court, since petitioner failed to object to the court's charge. Only counsel for Marinello, an acquitted co-defendant, objected to the charge, and his objections were in the form of written objections submitted before the charge conference (13 R. 3547). At the charge conference, petitioner did not claim that the RICO charge was incorrect (Tr. 9566-9614). In these circumstances, we doubt whether, absent plain error, petitioner sufficiently preserved the issue to entitle him to raise it now. See *United States* v. *Frady*, 456 U.S. 152, 166 (1982); *Hankerson* v. *North Carolina*, 432 U.S. 233, 244 n.8 (1977); *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977); *Singer* v. *United States*, 380 U.S. 24, 38 (1965); *United States* v. *Mazzei*, *supra*, 700 F.2d at 87-88.

standing alone, we do not believe that this instruction was erroneous or would have confused or misled the jury. But at all events, this portion of the charge to the jury did not purport to be a complete statement of the offense. The court followed this shorthand description with a full and accurate exposition of the elements of RICO conspiracy, both in general and as applied to this case (Supp. R. 25-29). The court's fuller recitation of the elements of the offense did not contain the language "conspired to associate in fact" to which petitioner now objects. "[V]iewed in the context of the overall charge" (*Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973); see also Supp. R. 6), the court's instruction on this point was not in error.

c. Petitioner next complains (83-169 Pet. 13) of the court's explanation that "a conspiracy is a combination or agreement of two or more persons to join together to attempt to accomplish some unlawful purpose" (Supp. R. 25; see also *id.* at 26).* He argues that this instruction permitted the jury to convict based on a finding of an association to attempt to violate the law. While it might be preferable for courts to avoid using the term "attempt," because that term has a special legal significance in other settings, the instruction given in this case was most unlikely to be confusing to lay jurors unfamiliar with the principles applicable to the law of "attempt." Rather, to a lay jury the instruction given was likely to convey precisely what it was meant to convey —that a conspiracy is an agreement to commit an offense, but that it does not require that the agreement actually result in the consummation of a completed offense. This is particularly true in light of the fact that the remainder of the court's conspiracy instruction

---

*This is the definition set out in the Fifth Circuit's pattern instruction booklet. See U.S. Fifth Circuit District Judges Association, *Pattern Jury Instructions — Criminal Cases* 60 (1978).

correctly and comprehensively described the concept of conspiracy to the jury, including the express statements that a conspiracy is a "mutual agreement by two or more persons to disobey or disregard the law" (Supp. R. 25) and that, in contrast to the conspiracy charge, the substantive RICO charge required that the defendants must have "accomplished the objects and purpose of the conspiracy alleged in count one" (Supp. R. 29).

d. In addition, petitioner challenges (83-169 Pet. 14-15) the court's instruction that, as an element of the substantive RICO offense, the government must prove beyond a reasonable doubt "[t]hat the defendant was associated with an enterprise" (Supp. R. 30). Petitioner urges that this instruction was improper because it permitted the jury to assume the existence of the enterprise and did not inform the jury that it must find the existence of an enterprise separate and apart from the pattern of racketeering activity. Again, there is no merit to this contention. Rather, it was entirely proper for the court to instruct the jury that, in order to convict, it must find beyond a reasonable doubt "that the defendant was associated with an enterprise." The court had defined the term "enterprise" before giving this instruction (Supp. R. 24), and it did so again immediately afterwards (Supp. R. 30). The court also charged the jury that it must find beyond a reasonable doubt that the enterprise engaged in or its activities affected interstate commerce (Supp. R. 30). The court's charge further stated that, in addition to finding that the defendant was associated with an enterprise, the jury must find that the defendant conducted or participated in the affairs of the enterprise through the commission of two or more connected offenses (Supp. R. 31). And the court defined the terms "racketeering activity" and "pattern of racketeering activity" and made it clear that these elements refer to criminal acts (Supp. R. 24). Accordingly, the jury was adequately apprised of the different elements of the RICO substantive offense.

e. Finally, petitioner suggests (83-169 Pet. 11, 19-20) that the evidence was insufficient to prove the existence of an enterprise. This claim is unavailing. Viewed in the light most favorable to the government (*Jackson* v. *Virginia*, 443 U.S. 307, 317-319, 324, 326 (1979)), the evidence demonstrated that the defendants functioned as a continuing unit with the shared objective of obtaining insurance contracts through unlawful means, and thus it sufficed to establish the requisite enterprise. See *United States* v. *Turkette*, *supra*, 452 U.S. at 580, 583.

The activities of the defendants at issue in this case extended over a period of approximately one year, from February 1979 to February 1980 (83-29 Pet. App. A58-A59). In addition, each of the defendants, as well as Hauser and the undercover FBI agents, played a specific role in the scheme. In particular, petitioner Marcello established an informal organization to obtain insurance contracts through bribery in local, statewide, and out-of-state areas; to this end, Marcello involved petitioner Roemer, who, as the "top man" and the "decision maker" (see page 3, *supra*), was critical to the operation with respect to the state employees' insurance contract and also took part in the efforts to obtain other contracts as well. Furthermore, a large number of meetings and other contacts occurred among the participants (83-29 Pet. App. A59-A60), and, in order to conceal the direct evidence of their involvement, petitioners used co-defendant Young as an intermediary in communicating with each other to set up meetings or pass messages (see, *e.g.*, Gov't Exh. 161; Gov't Exh. 162, at 1-3). This record plainly supports the district court's conclusion, affirmed by the court of appeals (83-29 Pet. App. A3), that (*id.* at A104) "the government amply proved an agreement to participate in an enterprise separate and apart from the mere commission or agreement to commit acts of racketeering activity." See *United States* v. *Griffin*, *supra*, 660 F.2d at 1001. And,

contrary to Marcello's assertion (83-169 Pet. 11, 20), the fact that the evidence established a conventional conspiracy as well as a RICO offense does not cast doubt on the validity of the RICO conviction. Cf. *United States* v. *Batchelder*, 442 U.S. 114, 123-124 (1979).[8]

2. As the case went to the jury, the RICO conspiracy count charged three predicate acts of racketeering with respect to petitioner Roemer — bribery, wire fraud, and mail fraud.[9] Roemer concedes that he agreed to commit

---

[8] *United States* v. *Bledsoe*, 674 F.2d 647 (8th Cir.), cert. denied, No. 82-5071 (Nov. 29, 1982), upon which petitioner relies (83-169 Pet. 16-17), does not compel a different conclusion. First, *Bledsoe* relied (674 F.2d at 664-665) on the decision of the Fourth Circuit in *United States* v. *Griffin*, *supra*, which, as petitioner concedes (83-169 Pet. 17), is contrary to his position here. Moreover, the record in this case, as outlined above, is adequate to meet the *Bledsoe* standard, including, in particular, the requirement that the enterprise "must have an 'ascertainable structure' distinct from that *inherent* in the conduct of a pattern of racketeering activity" (674 F.2d at 665 (emphasis added)); the operations involved in the fraud and bribery scheme extended well beyond those "necessary to perpetrate the predicate crimes" (*ibid.*) and were comparable to those in the prostitution ring cited in *Bledsoe* as an example of an enterprise (*ibid.*, citing *United States* v. *McLaurin*, 557 F.2d 1064 (5th Cir. 1977), cert. denied, 434 U.S. 1020 (1978)). Nothing in *Bledsoe* or in any other authority cited by petitioner supports his proposed test (83-169 Pet. 18) that "RICO conspirators at a minimum must have the common bond of furthering the larger goals of the enterprise apart from furthering the lesser goal of committing the specific offenses charged as predicate acts," and such a test would be, we submit, at odds with this Court's decision in *United States* v. *Turkette*, *supra*.

[9] Initially, two additional acts of wire fraud were charged against Roemer, but the district court granted a judgment of acquittal on those counts before the case was submitted to the jury. The predicate acts of racketeering charged against petitioner Marcello consisted of one act of bribery, eight acts of wire fraud, one act of interstate travel in furtherance of the bribery and fraud scheme, and one act of mail fraud. See 83-29 Pet. 12 n.13; 83-29 Pet. App. A61 n.7; 83-169 Pet. 3-4 & nn. 2, 3. In the court of appeals Marcello did not dispute that he had agreed to commit at least two predicate offenses necessary to establish a pattern of racketeering activity. See Gov't Br. 46 n.26.

bribery (83-29 Pet. 11), and he does not challenge in this Court the validity of the predicate act of wire fraud (*id.* at 12 n.13). However, relying on theories of statutory construction, federal jurisdiction, and due process, he asserts (*id.* at 11-22) that the predicate act of mail fraud was invalid because the government "orchestrated [the] mailing" (*id.* at 11) in that the "mailing [was] evidenced solely by a letter that was conceived, chosen and executed by government agents" (*id.* at 12). This claim rests on a misconstruction of the record.

The mailing at issue was an insurance proposal from Hauser and petitioner Marcello that was sent to petitioner Roemer on November 2, 1979. As the district court stated (82-29 Pet. App. A76, A79-A80), "[t]hroughout the course of their dealings with the [undercover] agents Marcello and Roemer had requested a written proposal from Hauser and the agents for Roemer's use in transferring the state insurance contract from its existing carrier to the undercover agents. * * * * * The proposal was prepared and placed in the mail as a result of persistent requests by the defendants that Hauser and the agents provide Roemer with just such a written proposal."

With particular regard to Roemer, "[i]n their earliest meetings, Roemer had suggested that Hauser send him a written proposal concerning the insurance contract * * *" (83-29 Pet. App. A80; see also Tr. 859-860, 4284-4285, 6126-6127; Gov't Exh. 58, at 4, 6-7, 9). In addition, Roemer "made his assistant * * * available to provide information needed for preparation of the proposal" (83-29 Pet. App. A80; see also Tr. 860-861, 4285, 6128-6129; Gov't Exh. 56, at 1-6). Subsequently Roemer began "to press" for the proposal (83-29 Pet. App. A80): he asked for the proposal when he met with Marcello on September 21 (Tr. 8615-8616), when he met with Hauser on September 25 (83-29 Pet. App. A80), when he met with Marcello and Hauser on

October 11 (*id.* at A80-A81), and when he spoke with Marcello on November 2, 1979, and said that he " 'need[ed] to see somethin', what their proposal is' " (*id.* at A81). In addition, Roemer expressed his "eagerness to receive the proposal by almost any means available" (*id.* at A83).

On November 2, the proposal was mailed to Roemer after "Marcello had reviewed it approvingly" (83-29 Pet. App. A78). Marcello then called Roemer to assure him "that the proposal he desired was on its way * * *" (*id.* at A81). After being told that the proposal had been mailed, Roemer replied, " 'Okay. That's good then' " (*id.* at A97).

Based on this record, it is clear that Roemer knew that the mails were being used to execute the scheme and that he agreed to and approved of such use. As the district court concluded, "there was ample evidence * * * to support a finding that both defendants actually agreed to use the mails * * * as part of their agreement * * * * *. [T]he evidence * * * shows not only the expectation that the mail * * * would be used to further the scheme, but also the defendants' assent and approval of the use of those means of effecting the plan" (83-29 Pet. App. A95, A98; see also *id.* at A83). And, in affirming the district court's determination, the court of appeals specifically noted (*id.* at A3 n.1) that "there was sufficient evidence to support the finding of agreement by Roemer to commit mail fraud," and it expressly accepted the finding of the defendants' " 'expectation' " and " 'assent and approval' " of the use of the mails (*ibid.*).

Furthermore, the interstate nature of the operation was fully apparent to petitioners at all times. "Both Marcello and Roemer knew from the outset of their dealings with Hauser and the agents that their operation was based in California" (83-29 Pet. App. A95). Petitioners were "kept * * * apprised, often at [their] requests, of the[] travel plans

[of Hauser and the agents]" (*ibid.*). And the "scheme in which the defendants were involved was broad in scope * * *" (*ibid.*). Given "[t]he nature of the plan to obtain the state insurance contract and the fact that the defendants knew the Hauser group was based cross-country[,] * * * the defendants contemplated the use of the mail * * * which occurred in furtherance of the scheme" (*id.* at A96).[10]

Accordingly, this is not a case in which government agents introduced a federal nexus into what was otherwise an entirely local offense. Rather, by the nature of their scheme, petitioners were "engaged in activities of an interstate character." *United States* v. *Brooklier*, 685 F.2d 1208, 1217 (9th Cir. 1982), cert. denied, No. 82-1013 (Feb. 22, 1983); *United States* v. *Perrin*, 580 F.2d 730, 736 (5th Cir. 1978), aff'd, 444 U.S. 37 (1979).[11]

For these reasons, *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973), upon which petitioner relies (83-29 Pet. 16-17), is inapposite. In that case, the court reversed convictions on the ground that the federal agents had deliberately

---

[10]The district court also concluded (83-29 Pet. App. A95, A98) that petitioners contemplated and agreed to use interstate telephone facilities in furtherance of their scheme. Because no challenge is raised here to the validity of the predicate act of wire fraud (see page 10, *supra*), that evidence need not be discussed. See, *e.g.*, Tr. 8615-8619; Gov't Exh. 21; Gov't Exh. 28; Gov't Exh. 34; Gov't Exh. 40; Gov't Exh. 47; Gov't Exh. 58, at 6, 8-9; Gov't Exh. 62; Gov't Exh. 71; Gov't Exh. 74; Gov't Exh. 77, at 8; Gov't Exh 99; Gov't Exh. 109-110, p.32. We point out, however, that this evidence further establishes both the interstate character of the scheme and petitioners' awareness of the interstate activity that occurred in pursuance of the scheme.

[11]Thus, petitioner's extensive quotation (83-29 Pet. 18 n.20) from Judge Swygert's dissenting opinion in *United States* v. *Craig*, 573 F.2d 455, 505 (7th Cir. 1977), is inapt. The offense in this case was not a "local matter" expanded into a federal prosecution by "fortuit[ies]" or "mere technicalities * * * [of] federal jurisdiction" (*ibid.*). Petitioners willingly and deliberately participated in a variety of interstate activities that were "an integral part of the scheme" (*ibid.*).

fabricated federal jurisdiction by making and causing the defendants to make long-distance telephone calls that served no purpose other than to provide the jurisdictional basis for converting a state offense into a federal crime. Here, in contrast, "federal jurisdiction was not created solely and impermissibly by the activities of government agents in the manner prohibited by the *Archer* case" (83-29 Pet. App. A68). See also *United States* v. *Pecora*, 693 F.2d 421, 424 (5th Cir. 1982), cert. denied, No. 82-1595 (June 13, 1983); *United States* v. *Bagnariol, supra*, 665 F.2d at 897-898; *United States* v. *Perrin, supra*, 580 F.2d at 736. Indeed, the Second Circuit has itself interpreted *Archer* in a manner inconsistent with petitioner's argument. On rehearing, the court explained that it had gone "no further than to hold that when the federal element in a prosecution under the Travel Act is furnished *solely* by undercover agents, a stricter standard is applicable * * *" (*United States* v. *Archer, supra*, 486 F.2d at 685-686 (emphasis added)). And the Second Circuit has subsequently observed that *Archer* was grounded in both "unsavory police practices" and the "government's initiation of the interstate aspect of the criminal activity * * * " (*United States* v. *Herrera*, 584 F.2d 1137, 1146 (2d Cir. 1978)), neither of which is present here. See also *United States* v. *Gambino*, 566 F.2d 414, 419 (2d Cir. 1977), cert. denied, 435 U.S. 952 (1978).

Finally, the district court expressly found (83-29 Pet. App. A68) that the government's involvement "was not so unusually pervasive as to violate those notions of justice and fair play embodied in our concept of due process and necessary for the proper administration of our criminal justice system." Nor did the government's conduct exceed "the bounds of legitimate undercover law enforcement techniques" (*id.* at A83). Rather, the "evidence shows that the Brilab undercover operation in Louisiana merely afforded the opportunites and facilities for the commission

of an offense," with the "general thrust of the scheme, the specific direction it took, and the details of its execution, as well as the federal jurisdictional elements, * * * [being] provided by the defendants" (*id.* at A84). These conclusions, accepted by the court of appeals and well buttressed by the evidence of petitioners' involvement in and substantial direction of the scheme, refute Roemer's claim that his conviction should be reversed "either under due process principles or under the Court's supervisory power" (83-29 Pet. 20).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

SARA B. CRISCITELLI
Attorney

SEPTEMBER 1983

DOJ-1983-09